

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY AVERAGE WHOLESALE PRICE LITIGATION)	MDL No. 1456
)	Master File No. 01-12257-PBS
)	Subcategory Case No. 06-11337
)	
)	Judge Patti B. Saris
THIS DOCUMENT RELATES TO:)	
<i>State of California, ex rel. Ven-A-Care v.</i>)	Magistrate Judge
<i>Abbott Laboratories, Inc., et al.</i>)	Marianne B. Bowler
Case No: 1:03-cv-11226-PBS)	
)	

**STATE OF CALIFORNIA'S UNOPPOSED MOTION FOR LEAVE TO FILE A SUR-
REPLY BRIEF IN FURTHER OPPOSITION TO DEFENDANTS' MOTION FOR AN
ORDER GRANTING LEAVE TO TAKE DEPOSITION OUT OF TIME**

Pursuant to Rule 7.1(b)(3) of the Local Rules for the District of Massachusetts, Plaintiff

State of California seeks leave of Court to file a Sur-Reply Memorandum in Opposition to Defendants' Motion for an Order Granting Leave to Take Deposition Out of Time (Def. Mot., Dkt. 6394, 376). Counsel for Defendants have indicated that they do not oppose Plaintiff's request to file a sur-reply.

1. **This Court should permit the instant sur-reply to be filed, or in the alternative should ignore Defendants' spoliation argument, because Defendants' Reply raises the issue of spoliation for the first time.**

In their Reply brief (Def. Rep., Dkt. 6582, 489) Defendants claim they should be permitted to conduct a late deposition of Mr. Ahrens because, *inter alia*, the fact that "California failed to produce any documents pertaining to him indicates that his electronic documents were destroyed when he left DHS. Thus, the only way Defendants can learn of the relevant information he may possess is through his deposition." Def. Rep. at 5. That argument appears nowhere in the underlying Motion. *See* Def. Mot. at 1-4.

The decision to grant or deny leave to file a sur-reply is committed to the sound discretion of the court. *Am. Forest & Paper Ass'n, Inc. v. Envtl. Prot. Agency*, 1996 WL 509601,

at *3 (D.D.C. Sept. 4, 1996). If the movant raises arguments for the first time in his reply to the non-movant's opposition, the court will either ignore those arguments in resolving the motion or provide the non-movant an opportunity to respond to those arguments by granting leave to file a sur-reply. *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003); *Natural Res. Def. Council, Inc. v. Env'l. Prot. Agency*, 25 F.3d 1063, 1072 n. 4 (D.C. Cir. 1994); *Pa. Elec. Co. v. Fed. Energy Regulatory Comm'n*, 11 F.3d 207, 209 (D.C. Cir. 1993); *see also Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 195 (D.C. Cir. 1992) (acknowledging that consideration of arguments raised for the first time in a reply would be "manifestly unfair" to the respondent); *Corson & Gruman Co. v. Nat'l Labor Relations Bd.*, 899 F.2d 47, 50 n. 4 (D.C. Cir. 1990) (requiring parties to raise all of their arguments in their opening briefs "to prevent sandbagging").

This Court should therefore (a) permit the attached proposed Sur-Reply to be filed, or (b) should instruct the parties that it is ignoring Defendants' spoliation claim in the adjudication of the underlying discovery dispute.

Plaintiff's proposed Sur-Reply Brief is attached hereto as Exhibit A.

Dated: October 16, 2009

Respectfully submitted,

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By: /s/ Nicholas N. Paul
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**Attorneys for Plaintiff,
STATE OF CALIFORNIA**

CERTIFICATE PURSUANT TO LOCAL RULES 7.1 AND 37.1

I certify that the moving party conferred with Defendants' counsel and was informed Defendants did not object to California's request to file a sur-reply.

/s/ Nicholas N. Paul
NICHOLAS N. PAUL

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered to all counsel of record by electronic service pursuant to Paragraph 11 of the Case Management Order No. 2, by sending on October 16, 2009, a copy to Lexis-Nexis for posting and notification to all parties.

/s/ Nicholas N. Paul
NICHOLAS N. PAUL